LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 20 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 410 1

ELY BATKIN,

Petitioner,

—against—

UNITED STATES OF AMERICA.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL P. DIRENZO
253 Broadway
New York 7, N. Y.
Attorney for Petitioner

IRVING A. JAMES
ARTHUR M. SOMMERFIELD
On the Brief

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

INDEX

	PAGE
A. The Opinion Below	1
B. Jurisdiction	2
C. Questions Involved	2
D. Constitutional Provisions and Statutes	2
E. Summary Statement	3
F. Reasons for Granting the Writ	4
I—This Is the First Criminal Prosecution For Sale of Unregistered Stock Which Required Registration Allegedly Because of Its Being "Control Stock"	4
II—The Admission of 340 Pages of Concerted False Statements of Alleged Co-Conspirators Spilled Over to the Prejudice of the Petitioner and Denied Him a Fair Trial	11
III—Petitions of Co-Defendants	16
CONCLUSION	16
Appendix A—Opinion of the U.S. Court of Appeals	1a
Appendix B—Judgment of the U.S. Court of Appeals	29a
Appendix C—Constitutional Provisions and Statutes involved	31a

PAGE

AUTHORITIES CITED

Cases

Delli Paoli v U.S., 352 U.S. 232 (1957) 14, 15

SEC v. Culpepper, 270 Fed. 2d 241 (2nd Cir. 1959) 9
SEC v. Ralston Farina Co., 346 U.S. 119 9

U.S. v. Gordon, 253 Fed. 2d 177 (7th Cir. 1958) 15
United States v. Jacangelo, 281 Fed. 2d 574 (3rd Cir. 1960) 15
United States v. Kahaner, 203 Fed. Supp. 78 (S.D.N.Y. 1962, Weinfeld, J.) 15

Supreme Court Rules

Rule 19 2

Statutes

15 U.S.C. 77 ..... 2, 3
15 U.S.C. 77b(11) 6, 7, 8
15 U.S.C. 77e 6, 7
15 U.S.C. 77e(1) 7
15 U.S.C. 77q 8
18 U.S.C. 3651 4
28 U.S.C. 1254(1) 2

Fifth Amendment 2
Sixth Amendment 2

Miscellaneous

III Loss, Securities Regulation 1994 9

"The Void for Vagueness Doctrine in the Supreme Court", 109 U. of Pa. L. Rev. 67, n. 2 (1960) 8

IN THE

Supreme Court of the United States

October Term, 1964

No.

ELY BATKIN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, ELY BATKIN, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against him in the above entitled case on July 24, 1964.

A. THE OPINION BELOW

The opinion of the Court of Appeals in this case has not been officially reported. It is set forth in Appendix A annexed to this petition.

B. JURISDICTION

The judgment of the Court of Appeals was entered on July 24, 1964. The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by a writ of certiorari is sought of a judgment of affirmance by the United States Court of Appeals for the Second Circuit.

C. QUESTIONS INVOLVED

1. Does the Securities Act of 1933, as amended, (15 U.S.C.A. Sec. 77) require registration of securities, otherwise exempt from registration, when such securities are purchased from persons other than "control persons" but pursuant to "an understanding with" or "under the direction of" a "control person"?

2. Did the admission of 340 pages of concerted false statements of alleged co-conspirators which spilled over to the prejudice of the petitioner Batkin deny him a fair trial?

D. CONSTITUTIONAL PROVISIONS AND STATUTES

The Constitutional provisions and statutes involved are:

1. United States Constitution, Amendments V and VI.
2. United States Code, Title 15, Section 77.

E. SUMMARY STATEMENT

Petitioner was charged by Counts I and III of an eight count indictment with conspiracy to make use of the means of interstate commerce and of the mails to sell unregistered securities (Count I) and selling a specific 200 shares of unregistered stock (Count III) in violation of the Securities Act of 1933, as amended (15 U.S.C.A. Sec. 77). The entire indictment named seven defendants and eight co-conspirators. On an interim motion of petitioner Batkin and co-defendants Skoglund and Yaffe for separate trials or in the alternative for a severance, Counts IV through VIII were ordered severed and tried separately from the first three counts of the indictment. Counts IV through VIII alleged the making of false statements and representations to the Securities and Exchange Commission by several of the co-defendants and a conspiracy among them to make such false statements. The prosecution was given the option of trying such co-defendants on all the counts in the indictment in a trial separate from the petitioner Batkin and the other moving defendants but the prosecution chose to try all of the defendants in one trial by severing Counts IV through VIII. As a result, petitioner Batkin proceeded to trial with five other defendants, Gerardo A. Re, Gerard F. Re, Charles A. Grande, Jacob Yaffe and Verna Skoglund; the defendant Lowell Birrell was out of the jurisdiction at the time and did not stand trial.

Batkin was convicted on Count I as a conspirator, and on Count III as a seller of a specific 200 shares of unregistered stock. The Court of Appeals reversed his conviction on Count III and dismissed that count of the indictment.

The case against defendant Verna Skoglund was dismissed at the close of the government's case and the other

four defendants with whom Batkin stood trial were all found guilty of conspiracy on the first count of the indictment. The defendant, Jacob Yaffe, who was convicted along with Batkin on Count III of the indictment, received a suspended sentence and did not appeal.

Batkin was sentenced to three years imprisonment pursuant to Title 18, U.S.C.A. 3651 with the provision that six months were to be served in jail and he was also fined $10,000. on Count I of the indictment. The petitioner is presently enlarged on $15,000. bail.

F. REASONS FOR GRANTING THE WRIT

I.

This Is the First Criminal Prosecution For Sale of Unregistered Stock Which Required Registration Allegedly Because of Its Being "Control Stock".

It is respectfully submitted that this Court should grant *certiorari* so as to review the actions of the lower courts with respect to the interpretation of the Scurities Act for the information and guidance of securities dealers and others.

The indictment is concerned solely with the purchase and sale of common stock of Swan Finch Oil Corporatiton, admittedly never registered, under circumstances which the Government contends required the filing of a registration statement with the Securities and Exchange Commission.

The common stock of Swan Finch was traded continuously upon the American Stock Exchange (formerly known as the New York Curb Exchange) from about 1922 with-

out ever having been registered. The Securities Act of 1933, as amended, specifically exempts from the statute and, therefore, from the requirement of registration, all stock issued prior to or within 60 days after the enactment of the statute. In 1935, the United States Securities and Exchange Commission indicated its agreement that the then issued Swan Finch common stock was exempt from registration by issuing an order which permitted the continuance of trading of that stock on the Exchange without the necessity for registration with the Commission or compliance with any other formalities. At that time, there were approximately 40,000 shares issued and outstanding.

In 1954, Lowell M. Birrell acquired approximately 11,000 shares of Swan Finch stock from one Moncrieff and his wife. Moncrieff was the President of the corporation and in control of it. Birrell was named as a defendant in the indictment but was not tried with the other defendants as he was never placed in custody, having fled the jurisdiction some years ago.

After the acquisition of control of the company by Birrell through one of his many corporations, the outstanding shares of Swan Finch Oil Corporation were increased substantially, due to a three for one stock split in 1955 and the issuance of additional stock by the corporation in exchange for assets acquired by it from various parties. The Transfer Agents and Registrars (New York City Banks), handled these transactions on behalf of Swan Finch and, on instructions from management, issued the new stock. It is not claimed nor does it appear that the banks required registration with the Securities and Exchange Commission of such shares of stock upon issuance.

Indeed, the Government does not contend that any registration was required or any illegality was entailed in the issuance of the shares involved in the stock split, nor of the shares issued in exchange for assets. It is agreed that all of these shares were exempt from registration. The Government contends, however, that this exemption was lost when the shares came into the possession of a "control" person, namely, Lowell Birrell.

This contention is based upon Section 2(11) (15 U.S.C. 77b(11)) of the Securities Act of 1933, as amended, which defines the term "Underwriter" and in that context, also defines the term "Issuer" to include a controlling person. The Government's theory is that the sale by Birrell was a new "issue" and, therefore, not exempt from the provisions of the Act. The purchase from a "control" person under the Government's theory made the Petitioner an underwriter, and, therefore, pursuant to Section 4 (15 U.S.C. 77b) of the Securities Act, subject to the provisions of Section 5 (15 U.S.C. 77e), which requires registration of the securities. As we shall see, the Court expanded the theory to include purchases from other than "control" persons if pursuant to an understanding with, or the directions of, a "control" person.

It is conceded that Lowell Birrell became a "control" person of Swan Finch. It is claimed by the Government in the proof of Count I of the indictment that Birrell, after he acquired control, arranged for the defendants Res to become specialists on the Exchange handling the Swan Finch stock and as a result, managed to control the price of such stock. While the price was being maintained by the Res on the Exchange, the Government contends that

Sinclair Securities Corp., allegedly owned and controlled by defendants Batkin and Yaffe, sold stock of Swan Finch Oil Corporation to the public over-the-counter.

Section 5 of the Securities Act of 1933, as amended, (15 U.S.C. 77e) prohibits the sale by any person of unregistered stock. Section 4(1) of the Act (15 U.S.C. 77d)(1)) provides that the provisions of Section 5 shall not apply to transactions by persons who are not Issuers, Underwriters or Dealers. Section 3(A)(1) of the Act (15 U.S.C. 77c(1) exempts from registration any securities issued prior to 60 days after the effective date of the statute. Section 2(11) (15 U.S.C. 77b(11)) defines an "Underwriter" as a person who has purchased from an issuer securities with a view toward public distribution and in this context, defines "Issuer" to include "any person directly or indirectly controlling or controlled by the Issuer, or any person under direct or indirect common control with the Issuer."

The terms "control" and "control stock" are nowhere defined in the statute.

There is no question but that no shares of Swan Finch stock have ever been registered. Shares of Swan Finch were issued prior to the effective date of the statute and were, therefore, exempt from registration. Further shares were issued after the effective date but pursuant to other exemptions contained in the statute. The shares of Swan Finch were for many years traded on the American Stock Exchange and in 1935, the Securities and Exchange Commission issued an order granting continuance of unlisted trading privileges for Swan Finch on such Stock Exchange.

The Government does not question the fact that the shares of Swan Finch were originally exempt from registration but contends that this exemption was lost. It is the Government's claim that Lowell Birrell became a controlling person of Swan Finch, and therefore, pursuant to the definition contained in Section 2(11) of the Securities Act of 1933, as amended, he became an "Issuer" and the Petitioner Batkin and others were therefore "Underwriters".

It is ancient law that a criminal statute is fatally vague if it conceals from one who seeks to conform to lawful standards what those standards are. We respectfully submit that a statute which does not define "control" or "control stock", which contains a specific exemption for shares issued prior to the effective date of the statute, and which is used to sustain an indictment for criminal prosecution based upon the claimed loss of an exemption which requires use of the definition of the term "underwriter" without the concomitant definition in the statute of the term "control" is fatally vague.

See:

> "The Void for Vagueness Doctrine in the Supreme Court", 109 U. of Pa L. Rev. 67, n. 2 (1960).

The lower Courts did not have the benefit of previous court consideration in criminal cases of the terms "control" and "control stock". The usual criminal case involving the Securities Act of 1933 arises out of the anti-fraud provisions of the Act (Title 15 U.S.C. 77q). Criminal prosecutions under the registration provisions of the Act are exceedingly rare. The few cases that have occurred have involved new issues by companies who seek to avoid registra-

tion by setting up nominees and claiming that the issue was intrastate rather than interstate. Louis Loss, in his treatise on "Securities Regulations" states "In the entire history of the Securities Act, there has been only a handful of criminal prosecutions based on Section 5 alone, always under extenuating circumstances." III Loss, Securities Regulation 1994.

The "extenuating" circumstances to which Professor Loss refers include a prosecution against a noted swindler, Alexander Guterma, and Professor Loss apparently finds "extenuating" the desire of the Government to bring to book a noted swindler against whom they could prove no other case. We cannot help but note the parallel of Lowell Birrell, here named as co-defendant. In this case, however, Lowell Birrell was not brought to book but rested comfortably out of the jurisdiction. In the other cases involving violations of Section 5 of the Securities Act, we have found none that rest upon the sale of "control stock". This is, therefore, a matter of first impression in a criminal case.

In *SEC* v. *Culpepper*, 270 Fed. 2d 241 (2nd Circ. 1959), the Court, in sustaining the granting of a permanent injunction pointed out that under the authority of *SEC* v. *Ralston Farina Co.*, 346 U.S. 119, the burden was on the broker-dealer to prove his claimed exemption from the provisions of the Act and further found that there was ample evidence for the Trial Court to reasonably find the Appellants to be in "common control with" or under the "control of the Issuer". In the instant case, the burden is not upon the Petitioner but upon the Government to prove every aspect of the claimed violation of law. The Court, moreover, did not charge the jury that it was to find the Peti-

tioner Batkin guilty if it believed that he was "under direct or indirect common control with the Issuer". Instead, the Court said:

> "Now any stock owned directly or indirectly by a control person or over which he has the power of disposition is control stock, and if another with a view toward making a distribution to the public, knowingly acquires stock from a control person, *or pursuant to an understanding with, or upon instructions from a control person,* this stock in his hands is also control stock". (emphasis supplied)

Does the statute say that acquiring stock from persons who are not in control but pursuant to an "understanding" with a control person requires registration? And what kind of "understanding"? If the statute is vague, the Court is vaguer still.

Further, the Court, in defining for the jury the term "Underwriter", charged the jury as follows:

> "He is an underwriter if he purchases the stock from a control person *or if under the direction of that control person he acquires the stock from others and, in either case, turns around and knowingly sells the control stock to the public*". (emphasis supplied)

Does the statute say that if a control person directs one to the source of non-control stock, that the stock changes in character to control stock?

So vague and unsure is the Court as to control stock, that he was of no help to the jury. Indeed, the only conclusion the jury could come to under the Court's instructions was that if Lowell Birrell had anything whatsoever to do with the stock or its purchase, the stock was "control" stock and

they must find the Petitioner guilty. We submit the statute is not so far reaching and that this judicial interpretation and definition of control stock denied the appellant a fair trial.

The Court of Appeals, in its affirmance of the conviction of petitioner on Count I, did nothing to clear the confusion, since it stated that "The meaning of 'control' under the act is no different than it is in normal everyday usage". This definition may very well apply to an individual or to an action, but it hardly applies to a piece of paper which is a stock certificate and certainly, the Trial Court was in error when it enlarged on the definition as it did in its charge to the jury. The Court of Appeals should have clarified the statute with reference to "control" in its application to persons and stock under the facts in this case.

II.

The Admission of 340 Pages of Concerted False Statements of Alleged Co-Conspirators Spilled Over to the Prejudice of the Petitioner and Denied Him a Fair Trial.

During the course of the trial, the Government read into the record in the presence of the jury, testimony previously given by the co-defendants Charles Grande, Jerry Re, Sr. and Gerard Re, Jr., before the Securities and Exchange Commission, for the avowed purpose of showing guilty knowledge on the part of such defendants in the making of false exculpatory statements. The Court, of course, cautioned the jury that it could consider the testimony of each defendant only as against such defendant. It is the position of the Government that the precautionary statements made

by the Court were sufficient to avoid any prejudice against the other defendants, including Batkin.

It is respectfully submitted that the admission of these statements which covered an extended period of time and approximated 340 pages of the transcript, seriously prejudiced the Petitioner Batkin and prevented his receiving a fair trial. While Batkin was not mentioned in this testimony, he was inevitably entangled in the jury's minds with the lying of his alleged co-conspirators.

District Judge Murphy, in deciding motions made by defendants with reference to the original eight count indictment, gave the Government the choice of trying the defendants named in all eight counts separately and severing the trial of the other defendants, or in the alternative, severing the counts of the indictment and trying all defendants on only three counts, which latter alternative the Government adopted.

On the trial of the action, despite the opinion of Judge Murphy, the Government introduced the evidence which was the basis for Counts IV through VIII of the original indictment, which constituted approximately 340 pages of testimony.

The Government, having been given the choice of severing the trial of the action as to Petitioner Batkin if it wanted and needed to include the testimony referred to, did not avail itself of such option, tried all of the defendants together but, nevertheless, introduced the alleged perjurious statements through the back door. Since the Government, by severance of the defendants, could have introduced this testimony upon the trial of the Res and Grande, without a real objection, it must be assumed that

the introduction of the testimony was accomplished for the deliberate purpose of having it spill over on the Petitioner Batkin resulting in his conviction. There can be no doubt that if the Government had conformed to the decision of Judge Murphy and had tried the Petitioner Batkin separately from the Res and Grande, this testimony would necessarily have been excluded. Handling the matter as it did, the Government secured the advantage of trying all the defendants in a single trial and obtaining the benefit of indicating the perjury which was the basis of Counts IV through VIII of the indictment.

It must be noted at this time that at no time or place in the trial was there any evidence or proof showing any connection between Batkin and Yaffe on the one hand and Jerry Re, Sr., Gerard Re, Jr. and Charles Grande on the other. Therefore, any statements made by the Res or Grande could not concern any actions of Batkin in the alleged conspiracy but, nevertheless, unquestionably resulted in a spilling over of prejudice against the defendant Batkin. It was just this prejudice that Judge Murphy sought to avoid in his decision. Such decision in part said as follows:

> "The motions of defendants Skoglund, Yaffe and Batkin for separate trials, or in the alternative for a severance, are granted to the extent that the 'false statement, counts 4 through 8, will be severed and tried separately from the first three counts of the indictment. While we can conclude that the false statement offenses were occasioned by and grew out of the securities violations charged in the first three counts, and that consequently the joinder was not violative of Rule 8(a) or (b), F.R. Crim P., we nevertheless feel that defendants Skoglund, Yaffe and

> Batkin will be prejudiced by concurrent trial of all of the counts in the indictment. In the interests of justice we find that the severance is necessary. In the alternative, the Government may elect to try these three named defendants separately from the other defendants named in the indictment."

It is submitted that no change in the situation occurred from the time of the decision made by Judge Murphy to the time of the trial before Judge Bonsal. The same question was presented: Will the introduction of allegedly false testimony by three of the defendants prejudice the rights of the co-defendants? The question is hardly an involved one and was easily answered by a study of the indictment. The answer was given by Judge Murphy and should have been determined to be the law of the case by Judge Bonsal. The rights of the co-defendants should have been scrupulously guarded to avoid any prejudice. This was not done.

The Court of Appeals disposed of this question by reference to the case of *Delli Paoli* v. *U. S.*, 352 U.S. 232 (1957) in which this Court, by a 5 to 4 decision, held that the instructions given to the jury regarding statements of one defendant were sufficient to avoid prejudice resulting to the co-defendant. However, that case indicates quite clearly that this Court realized that there was a simple set of facts and that the instructions to the jury could easily be followed, particularly since the confession in that case was introduced at the very end of the Government's case and just prior to the Judge's charge so that it was deemed that the jury, in making its decision, was sufficiently aware of the instructions it received from the Trial Court. This is entirely different from the case at bar in which there are 340 pages of testimony requiring almost 2 days of reading in the midst of an extended trial.

The *Delli Paoli* case has caused much confusion which should be resolved by this Court as since such decision, at least two Courts of Appeal and one District Court, have construed it as destroying the fiction that the jury can follow the admonitions of the Trial Judge and as holding that in the *Delli Paoli* case, the confession was admissible because of its particular circumstances. *United States* v. *Jacangelo*, 281 Fed. 2d 574 (3rd Cir. 1960); *United States* v. *Kahaner*, 203 Fed. Supp. 78 (S.D.N.Y. 1962; Weinfeld, J.) and *U.S.* v. *Gordon*, 253 Fed. 2d 177 (7th Cir. 1958), in which the Court said, at page 183:

> "It is evident that this testimony could not have been other than damaging and prejudicial to Gordon. The Government justifies its admission, however, on the premise that it represented incriminating admissions by defendant MacLeod and that the Court's cautionary instructions sufficiently protected Gordon. Numerous cases are cited which have embraced the fanciful theory that any damage done to Gordon was cured by the Court's admonition to the jury. While the Courts still cling to the theory, there is a growing tendency to repudiate it, and we think the sooner this is done, the better."

The effect of the reading of this false testimony on Petitioner can hardly be measured despite the absence of any reference to Petitioner in such testimony, since its reading necessarily cloaked the entire trial with a mantel of guilt on the part of the defendants which unquestionably adversely affected Petitioner's rights. This is particularly true since the complaint involved a conspiracy so that any act upon the part of one of the defendants, directly or indirectly related to any other defendant, would undoubtedly result in detriment to such other defendant.

III.

Petitions of Co-Defendants.

Petitioner Batkin respectfully adopts, insofar as it may be applicable to him the arguments being advanced by co-defendants who are simultaneously filing similar petitions.

CONCLUSION

For the Reasons Hereinabove Set Forth, This Petition for a Writ of Certiorari Should Be Granted.

Respectfully submitted,

MICHAEL P. DIRENZO
Attorney for Petitioner

IRVING A. JAMES
ARTHUR M. SOMMERFIELD
Of Counsel

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 317—September Term, 1963.

(Argued March 2, 1964 Decided July 24, 1964.)

Docket No. 28526

UNITED STATES OF AMERICA,

Appellee,

—v.—

GERARDO A. RE, a/k/a JERRY A. RE, GERARD F. RE, CHARLES A. CASAGRANDE, a/k/a CHARLES A. GRANDE and ELY BATKIN,

Defendants-Appellants.

Before:

WATERMAN, MOORE and FRIENDLY,

Circuit Judges.

Four defendants appeal from judgments of conviction entered after a jury verdict in the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge*. Each appellant was found guilty on count one, which charged a conspiracy to violate the Securities Act of 1933, 15 U. S. C. A. §§77e(a), 77e(c), 77q(a), 77x, the Securities Exchange Act of 1934, 15 U. S. C. A. §§78i, 78j(b), 78ff(a) and 17 C. F. R. §240.10b-5. Convictions were also entered on count two (Gerardo A. Re, Gerard F. Re and Charles A. Casagrande) and count three (Ely Batkin) both of which charged a violation of 15 U. S. C. A. §§77e(a)(1) and 77x and 18 U. S. C. A. §2.

Appendix A—Opinion of the Court of Appeals

The conviction of Batkin on count three is reversed with directions to dismiss that count of the indictment as to him. The convictions of appellants on counts one and two are affirmed.

Sommerfield & James (Irving A. James, Arthur M. Sommerfield, Jacob Grumet, of counsel), New York, N. Y., *for appellant Ely Batkin.*

Michael P. Direnzo, New York, N. Y., *for appellant Charles A. Casagrande.*

Harris B. Steinberg (Stanley S. Arkin, of counsel), New York, N. Y., *for appellant Gerardo A. Re.*

Richard A. Green, New York, N. Y., *for appellant Gerard Re.*

Peter H. Morrison, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, John S. Martin, Jr. and David M. Dorsen, Assistant United States Attorneys, of counsel), *for the United States of America.*

Moore, *Circuit Judge*:

Gerardo A. Re, also known as Jerry A. Re (hereinafter Re, Sr.), his son Gerard F. Re (hereinafter Re, Jr.), Charles A. Casagrande, also known as Charles A. Grande (hereinafter Grande) and Ely Batkin appeal from judgments of conviction entered after a jury trial in the United States District Court for the Southern District of New York.

The case went to the jury after a ten-week trial on three counts of the original eight count indictment.[1] Count one charged appellants Re, Sr., Re, Jr., Grande and Batkin and defendants Lowell M. Birrell, Jacob Yaffe and Verna Skoglund with conspiracy to violate specified sections of the Securities Act of 1933 and the Securities Exchange Act of 1934[2] by using facilities of interstate commerce to sell unregistered stock of Swan-Finch Oil Corporation, to employ fraudulent methods in such sales; and to create the false appearance of an active Swan-Finch market on the American Stock Exchange. Count two charged that Re, Sr., Re, Jr., Birrell and Grande unlawfully made use of the facilities of the American Stock Exchange to sell 8,900 unregistered shares of Swan-Finch in violation of 15 U. S. C. A. §77e(a)(1), 77x and 18 U. S. C. A. §2. Count three charged that Batkin and Yaffe violated the same statutes in causing the mails to be used in the sale of 200 unregistered shares of Swan-Finch. The case against defendant Birrell, then a fugitive, was severed, and a judgment of acquittal was directed as to Verna Skoglund at the end of the Government's case. The jury found the remaining defendants guilty on each of the counts in which they were named. Yaffe, who was given a one year suspended sentence, has not appealed. Grande appeals only from his conviction on count two.

---

[1] Counts four through seven charged separate violations of 18 U. S. C. A. §1001 on the part of Re, Sr., Re, Jr., and Grande in the course of a matter within the jurisdiction of the Securities and Exchange Commission while count eight charged they they conspired to violate that section. On a motion for severance, the district court held that the joinder was not defective under Rule 8(a) or (b) of the Federal Rules of Criminal Procedure. Nevertheless, to safeguard the interests of defendants Skoglund, Yaffe and appellant Batkin, he ordered a severance of these counts.

[2] 15 U. S. C. A. §§77e(a), 77e(c), 77q(a), 77x; 78i, 78j(b), 78ff(a) and Rule 10b-5 of the S. E. C., 17 C. F. R. §240. 10b-5.

THE EVIDENCE

Since the sufficiency of the evidence on the conspiracy count is conceded, it will suffice to sketch in broad outline the activities in which the jury could have found appellants to have been engaged. The Government's case centered on the stock market enterprises of defendant Birrell, who from 1954 until 1957 had engineered the sale of more than 800,000 unregistered shares of Swan-Finch stock while simultaneously manipulating its price on the American Stock Exchange. The Government sought to prove that Re, Sr. and Re, Jr., who functioned as "specialists"[3] in Swan-Finch and other stocks on the American Exchange, were instrumental in the market manipulation of Swan-Finch stock and distributed the major portion of Birrell's Swan-Finch stock by way of a network of twenty-one brokerage accounts. Grande was a longtime friend of the Res, and accounts in his name were among those used by them in the distribution. Batkin was the undisclosed principal in Sinclair Securities, an over-the-counter brokerage firm also deeply involved in the Swan-Finch distribution.

In so far as the conspiracy and substantive counts charged the unlawful sale of unregistered securities, 15 U. S. C. A. §§77e(a)(1), 77x, 18 U. S. C. A. §2, the Government proceeded on the theory that appellants knowingly participated in the sale of "control" stock which emanated from Birrell. Briefly, the Securities Act of 1933 proscribes the sale of unregistered stock by an "underwriter," *i.e.*, one

[3] For a thorough description and discussion of the role of the market "specialist," see generally Leflar, *The Stockmarket* 216 (2d ed. 1957); 2 Loss, *Securities Regulations* 1201-09 (2d ed. 1961).

who provides an outlet for the stock of an "issuer." See *United States* v. *Dardi*, 330 F. 2d 316, 325 (2d Cir. 1964); *United States* v. *Crosby*, 294 F. 2d 928, 939-40 (2d Cir. 1961), *cert. denied sub nom. Mittleman* v. *United States*, 368 U. S. 984 (1962). The relationship between Birrell (the "issuer") and appellants (the "underwriters"), therefore, was basic to the Government's proof.

Market Manipulation

Birrell acquired control of Swan-Finch[4] in May, 1954 and immediately committed 10,000 Swan-Finch shares to Re, Sr. and Grande by way of a three-month call. Within two months he had arranged to have the Res appointed specialists. Although it had been long dormant, Swan-Finch stock soon began a rather spectacular market rise. The Government's explanation of this sudden and uncalled for enthusiasm was that as specialists the Res knew exactly how much stock to buy or sell in order to raise or lower the market. With the Res' help, Birrell could control the price at will. There was also evidence that this manipulation extended to other stocks whose market performance was closely tied with that of Swan-Finch.

In June and July, 1956, Sidney Barkley and Charles Rosenthal, undisclosed principals in the over-the-counter brokerage firm of I. F. Stillman & Co., agreed with Birrell to enter the market rigging operation. The Stillman firm, which engaged in so-called "boiler-room" sales tactics, was to support the Swan-Finch market on the Exchange with

[4] Swan-Finch manufactured lubricating oils and greases. It enjoyed unlisted trading privileges on the American Exchange.

buy orders and later to sell the stock thus acquired over-the-counter. For this service, Birrell made "under-the-table" cash payments. Since the Stillman sales campaign depended largely on the closing price, Re, Sr. agreed to advise Barkley and Rosenthal of any increased selling so that Stillman could absorb the supply. Re, Sr. was also to tell Barkley and Rosenthal what was "on the book" so that they would know exactly how much to purchase to raise the price on any particular day.[5] If Stillman & Co. was unable to meet the sell orders, it was understood that Re, Sr. would make the purchase required to maintain the desired market level. On at least one occasion, Re, Sr., Barkley and Birrell met to review the Swan-Finch rigging operation. Barkley testified that Re, Sr., annoyed by Birrell's failure to deliver some stock, exclaimed that he did not care what happened to Birrell's market. Barkley interjected that he could not afford a market drop since his customers would refuse to pay if the market fell. Birrell was able to reassure Re, Sr. that the stock would be forthcoming and Re, Sr. seemed appeased. On one other occasion, Birrell told Re, Sr. to buy a large block of stock rather than let Swan-Finch suffer a drop in price.

The Distribution

While the market rigging continued with full vigor, the Res, Grande and Batkin were engaged in distributing Birrell's Swan-Finch stock. When Birrell acquired control in 1954, there were 34,794 shares of common stock outstand-

[5] The specialist is prohibited from disclosing the information on his "book" to anyone other than an official of the Exchange or a representative of the S. E. C. by 15 U. S. C. A. §78k(b).

ing. However, through a series of issuances and a three-for-one stock split, there were in excess of 2.8 million shares outstanding by January 15, 1957. Appellants participated in the distribution of approximately 800,000 of the more than 1 million shares which came to be controlled by Birrell. None of this Swan-Finch stock was registered with the Securities and Exchange Commission (S. E. C.).

The Res' distribution of over 600,000 shares of Birrell's Swan-Finch on the American Exchange was accomplished by means of twenty-one stock accounts maintained at three brokerage houses. Nineteen of these accounts, according to the Government, were opened, controlled and managed exclusively by the Res and they controlled the Swan-Finch activity in two others. Accounts opened in Grande's name were the vehicles by which a total of 498,500 shares were distributed; other accounts, maintained in the names of relatives and friends of the Res and Birrell or controlled by Birrell, were employed for the sale of an additional 117,700 shares. Accounts maintained by the Res began to sell Birrell's stock the day they became specialists in Swan-Finch. Generally, they would sell shares from an account of their choice and then, to cover the sale, cause stock to be delivered to that account from a Birrell-controlled source at a price below the market. There was evidence that the floor partner for Josephthal & Co., where the substantial Grande accounts were maintained, gave the Res orders on a "not held" basis which permitted them to exercise discretion in their execution.[6]

The Res' distribution on the Exchange was augmented by the over-the-counter sales of three firms: I. F. Stillman

[6] This is specifically prohibited by 15 U. S. C. A. §78k(b).

& Co., L. S. Mack & Co., and Sinclair Securities Corporation. Barkley and Rosenthal (I. F. Stillman & Co.) successfully "boiler-roomed" approximately 70,000 Swan-Finch shares which they had acquired on the Exchange in cooperation with the Res and Birrell. Birrell supplied stock to L. S. Mack & Co. at $5.00 per share and also gave Lloyd Mack, the firm's principal, an under-the-table cash payment based on the price at which Mack was able to sell to the public. Birrell chose the "S & C Trading Co., Inc." to camouflage his transactions with Mack, which eventually accounted for the sale of 21,925 shares.

The most effective participant in the over-the-counter distribution was Sinclair Securities. While ostensibly owned and managed by defendant Yaffe, the Government's proof readily allowed the inference that appellant Batkin was an undisclosed owner and that he actively engaged in Sinclair's sales of Swan-Finch. Although most of the 197,608 shares sold by Sinclair were obtained from Birrell, the books of Sinclair indicated fictitious sources. Batkin and Yaffe, along with the Res and the other participants in the distribution, received surreptitious cash payments from Birrell.

On this appeal, appellants urge that their convictions must be reversed on a variety of grounds. They attack the relevant provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 as vague and indefinite, and argue as well that the floor of the American Stock Exchange is not a means of communication in interstate commerce. Errors arising from the conduct of the trial are said to include the admission of hearsay business records and

the Government's knowing use of the testimony of a witness who was then the client of an attorney who had earlier represented the Res. Re, Jr. and Grande challenge their convictions on count two on the ground that the Government failed to prove that they had anything to do with the sale alleged. In a similar vein, Batkin contends that there was no proof that the 200 shares described in count three were in fact "control" shares; in addition he argues that he was denied a fair trial due to the admission of inculpatory testimony of the Res and Grande before the S. E. C.

THE "DERISI" RECORDS

Evidence of cash payments in substantial amounts was an important element in the Government's proof that appellants Re, Sr., Re, Jr., Batkin and other defendants were intimately allied with Birrell in the unlawful distribution and market manipulation. Although there was much additional proof to the same effect, the so-called "DeRisi" records were an important factor in establishing Birrell's payments to the alleged co-conspirators. Appellants claim that these records constituted hearsay and that their introduction into evidence was reversible error.

Joseph DeRisi was employed by Birrell as his bookkeeper from 1952 until 1958. At all times he took his orders directly from Birrell and worked without other supervision. He was chiefly concerned with keeping the books related to various corporations and personal bank accounts, all of which were controlled by Birrell. At trial, the Government's proof focused on the cash disbursement books of four of these accounts, those entitled "Birrell & Larson,"

"Harry Workman," "Ernest Espinosa" and "A. Hector Rivero." In connection with the many checks drawn on these accounts payable only to "cash," DeRisi's records showed notations which purported to identify the recipients. When totalled it was revealed that $239,180 had been paid to the Res while $246,800 was distributed to "Sinclair," "Yaffe" and "Bob," who, the jury was entitled to infer, was actually appellant Batkin.

The information which eventually found its way into the records kept by DeRisi came from the checkbook stubs of each account. Carter Whitney, Birrell's messenger and man "Friday," defendant Verna Skoglund, Birrell's secretary, DeRisi and perhaps Mrs. Skoglund's replacement, Miss Miller, always at Birrell's direction, wrote the checks. Birrell identified the recipient either when the check was drawn or when the cash was delivered. The practice was to note initials or some other abbreviation to identify on the stub the recipient of a check made payable to cash. The checkbooks were stored in a file cabinet in Whitney's office in Birrell's executive suite at Doeskin Products; the cabinet was kept locked and only Birrell, DeRisi, Mrs. Skoglund and Whitney had keys. In general, matters concerning the various accounts with which DeRisi was concerned were treated confidentially by Birrell and his office employees.

About two or three times a month, DeRisi examined these stubs and entered the amounts of the checks cashed along with the recipient there designated in the appropriate cash disbursement book "so that the bank statement could be reconciled with the cash book." DeRisi testified that he did so "in the regular course of business." On some occasions,

however, the check stub was incomplete, and DeRisi had to ask Whitney, Mrs. Skoglund or, "very rarely," Birrell himself, who the recipient had been. DeRisi would then complete the stub and make the appropriate cash book entry. He did not enter a recipient in the cash disbursement book when stub information was insufficient and no explanation was given by Whitney, Mrs. Skoglund or Birrell.

The Business Records Act, 18 U. S. C. A. §1732 provides in relevant part:

> "Record made in regular course of business; photographic copies.
>
> (a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> *All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.*
>
> The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind." (Emphasis added.)

As appellants concede, the DeRisi records have all the superficial trappings of business regularity that customarily

vouchsafe the absence of any motive to misrepresent. The records were kept on familiar ledger forms, were scrupulously regular, were made within a reasonable time after the transaction, and were prepared for a seemingly natural purpose under the specific orders of the employer. DeRisi described them as a "set of books" consisting of "a cash receipts book, a cash disbursements book, a general ledger and a general journal." Nevertheless, appellants urge on various ground that DeRisi's records amounted only to a diary of Birrell's personal affairs and that they lacked the traditional earmarks of trustworthiness contemplated by the statute.

There is no merit in the claim that because most of the information recorded by DeRisi reflected the affairs of one person—Birrell—that the records were merely "personal" and as such not within the purview of the Business Records Act. The statute makes no such qualification. "Business," is broadly defined so as to include "business, profession, occupation and calling of every kind." That Birrell, while distributing a huge block of control stock to the investing public through a complex system of brokerage accounts and over-the-counter sales, was engaged in a "business" or an "occupation" seems so obvious that discussion is scarcely necessary. And, the Government's proof makes it equally clear that the accounts which DeRisi's books reflected were directly involved in the distribution. For example, accounts in the names of Hector Rivero and Ernest Espinosa were used at Josephthal & Co. as vehicles for distribution and as sources of stock at Sinclair. An account in the name of Birrell & Larson was maintained at Birnbaum & Co. The

Harry Workman account appears as the source of Swan-Finch stock delivered to the Grande accounts at Josephthal & Co. and Ira Haupt & Co.

The fact that Birrell's business of distributing unregistered shares of Swan-Finch was unlawful does not affect the admissibility of his records as kept by DeRisi. "The Act does not discriminate between lawful and unlawful businesses." *United States* v. *Quick*, 128 F. 2d 832, 837 (3d Cir. 1942); see *United States* v. *Quong*, 303 F. 2d 499 (6th Cir.), *cert. denied*, 371 U. S. 863 (1962); *Arena* v. *United States*, 226 F. 2d 227 (9th Cir. 1955), *cert. denied*, 350 U. S. 954 (1956); *Spear* v. *United States*, 216 F. 2d 185 (4th Cir. 1954); *Fischer* v. *United States*, 212 F. 2d 441 (10th Cir. 1954). Moreover, courts have consistently given full effect to the statute's sweeping declaration that the "circumstances of the making" have a bearing only on the weight to be given the writing and not on its admissibility. Thus, irregularities similar to those found here, such as the informality of the abbreviations, see *Arena* v. *United States*, *supra*; *United States* v. *Alaimo*, 191 F. Supp. 625, 628 n. 7 (M. D. Pa.), *aff'd*, 297 F. 2d 604 (3d Cir. 1961), *cert. denied*, 369 U. S. 817 (1962), possible inconsistencies, see *LaPorte* v. *United States*, 300 F. 2d 878 (9th Cir. 1962), inaccuracies, see *United States* v. *Bernard*, 287 F. 2d 715 (7th Cir.), *cert. denied*, 366 U. S. 961 (1961), or incompleteness, see *United States* v. *Kimmel*, 274 F. 2d 54 (2d Cir. 1960) have not precluded admissibility, but have been factors for the jury to evaluate in considering the writing along with the other evidence. See also *Bodnar* v. *United States*, 248 F. 2d 481 (6th Cir. 1957). The fact that the records were not maintained in the most businesslike or efficient way is likewise imma-

terial on the threshold issue of admissibility. Furthermore, the statute itself expressly disposes of any difficulty presented by the fact that DeRisi in most instances lacked "personal knowledge" of the fact recorded by each entry. In sum, the minimum requirements of admissibility were clearly satisfied. See *United States* v. *New York Foreign Trade Zone Operators, Inc.*, 304 F. 2d 792, 796 (2d Cir. 1962).

Here there was an additional guarantee of reliability in that DeRisi did not gather his information from random sources but from fellow employees who also were acting in the regular course of business in making notations on the stubs in the first instance and in passing the data to DeRisi orally later on if they had neglected to mark the checkbook properly. See *United States* v. *Grayson*, 166 F. 2d 863, 869 (2d Cir. 1948). See generally Note, *Revised Business Entry Statutes*, 48 Colum. L. Rev. 920, 924-27 (1948).

It is, of course, true that records kept in the course of Birrell's enterprise do not fall into the category of the usual set of books found in the offices of legitimate commercial or industrial enterprises. Birrell's "business," "occupation" or "calling," however, was not of the usual orthodox nature. The very fact that the illegal distribution of 800,000 shares of unregistered stock by persons who had to be encouraged by cash payments to aid in achieving such a distribution by means of various accounts might well have called for an unusual set of books kept in an unusual manner. The proof is convincing that Birrell relied upon DeRisi as the keeper of his books, that DeRisi employed such means as were available within the Birrell business family

to record the entries on a regular basis and that DeRisi pursued his bookkeeping on a regular basis whether the books were physically located in the Doeskin office, at a Pennsylvania farm or in his own basement office (created at Birrell's suggestion).

To effect his stock transactions Birrell apparently thought it necessary to keep some records. The theory of section 1732 is to avoid the necessity of producing the person who actually participated in the transaction and then tracing through witnesses every step from payment to book entry. The Birrell books through DeRisi were subjected to *voir dire* and cross examination. The jury was made aware of the strength and weakness of the entries. There was no error in admitting the books in evidence.

The Government argues also that the records were admissible as acts or declarations by a conspirator in furtherance of the conspiracy. To support this thesis it points to the necessity in such a complicated operation of maintaining some kind of record of the various accounts and of the distribution of the profits. Appellants, in turn, contend that it must be established that the records were made to further some object of the conspiracy before they are admissible and that these records do not fall into such a category. It is unnecessary to resolve this question in view of our opinion that the records were admissible under section 1732.

THE ANTI-MANIPULATIVE PROVISION OF THE SECURITIES EXCHANGE ACT OF 1934 AS APPLIED TO SPECIALISTS

The first count of the indictment charged both Res with conspiring with Birrell and the other defendants to manipu-

late the market price in Swan-Finch in violation of the Securities Exchange Act of 1934, 15 U. S. C. §78i, 78j(b), 78ff(a) and Rule 10b-5 of the S. E. C., 17 C. F. R. §240.10b-5. Reduced to the essentials, appellants' argument is that the proscriptions of sections 78i(a)(2) and 78j(b) are irreconcilably inconsistent with the legitimate duty *of a specialist* under sections 78k(a) and (b)(2) to "maintain a fair and orderly market." They argue that "the result is an inconsistent, vague and confusing statutory scheme which fails to give adequate warning to a specialist of what he can and cannot do." There is no suggestion, however, that sections 78i(a)(2) and 78j(b) are unconstitutionally vague as applied to non-specialists, a theory previously rejected in this circuit. See *United States* v. *Minuse*, 142 F. 2d 388 (2d Cir.), *cert. denied*, 323 U. S. 716 (1944); *Wright* v. *S. E. C.*, 112 F. 2d 89, 94 (2d Cir. 1940).

Basic to appellants' defense was the claim that they acted in the legitimate role of specialists, not as market manipulators. This issue was fairly submitted to the jury by the trial court in his charge, which placed before them the question of whether the Res were acting as legitimate specialists. The court charged:

> "Two of the defendants—Re, Senior, and Re, Junior —were specialists in Swan-Finch on the American Stock Exchange, and their counsel has contended that a specialist is charged with the duty of maintaining an orderly market. So in determining the application of this section to them you must determine whether the evidence shows that Re, Senior, and Re, Junior, were maintaining an orderly market in Swan-Finch, as they were required to do as spe-

> cialists, or whether the government has proved beyond a reasonable doubt that they were knowingly and wilfully engaging in manipulating the price of the stock in the manner declared unlawful by the statute."

Inherent in the jury's verdict of guilt on the first count, therefore, was the determination that the Res were not performing the function of specialists in their dealings with Birrell in Swan-Finch. As the Court said in *United States* v. *Wurzbach*, 280 U. S. 396, 399 (1930), "the objection to uncertainty concerning the person embraced need not bother us now. . . . [I]t will be time enough to consider it when raised by someone whom it concerns." To the same effect see *United States* v. *Raines*, 362 U. S. 17, 21 (1960); *Dennis* v. *United States*, 341 U. S. 494, 516 (1951).

THE STOCK EXCHANGE AS A MEANS OF COMMUNICATION IN INTERSTATE COMMERCE

A question squarely posed by the Res' challenge to their conviction on count two is whether the floor of the American Stock Exchange is a means of communication in interstate commerce within the purview of 15 U. S. C. A. §77e(a)(1). That section provides, in relevant part, that "it shall be unlawful for any person . . . (1) to make use of any means or instruments of . . . communication in interstate commerce or of the mails to sell [an unregistered] security." In the transaction depicted in count two, Re, Sr. initiated from the floor of the Exchange a sale of 8,900 shares of Swan-Finch emanating from another broker and the account of appellant Grande. There was no allegation in the indictment of a use of the mails or telephone facilities.

in connection with the sale. Appellants contend that because several sections of the Securities Exchange Act of 1934, 15 U. S. C. A. §78i(a), 78j and 78k, specify "any facility of any national securities exchange," Congress could not have intended the phrase "means . . . of communication in interstate commerce" in the Securities Act of 1933 to include the floor of the American Exchange. Furthermore, while conceding that the Exchange floor may be considered as "contributing meaningfully to the stream of interstate commerce," appellants urge that the ordinary meaning and common usage of the language of the 1933 Act in itself prohibits a construction which would encompass the floor of a stock exchange. We cannot agree, and consequently hold that section 77e(a)(1) includes as a "means . . . of communication in interstate commerce" the floor of the American Stock Exchange.

Appellant's first theory, that the specific inclusion of "any facility of any national securities exchange" in the 1934 Act necessarily meant that Congress had intentionally excluded such a facility from more general language in the earlier Act, is not persuasive. See *United States* v. *Price*, 361 U. S. 304, 313 (1960); *Fogarty* v. *United States*, 340 U. S. 8, 13-14 (1950); *United States* v. *United Mine Workers*, 330 U.S. 258, 282 (1947). A somewhat similar problem was recently presented in *United States* v. *Roth, et al*, —— F. 2d —— (2d Cir. 1964), where two employers were convicted after arranging a loan in violation of 29 U. S. C. A. §186(a), prior to its amendment. The original enactment prohibited an employer from paying or delivering "any money or other thing of value" to a representative of his

employees. As amended, the section specifically included loans within the general prohibition. In holding that Congress' subsequent particularity did not detract from the unambiguous general provision of the original, we noted that the coverage of the earlier statute must be ascertained from its own terms. Such an approach is particularly appropriate here where two fundamentally different, if complementary, regulatory schemes are involved.

We likewise find no merit in appellants' alternative theory, that common usage and the plain meaning of the statutory terms preclude a holding that the floor of the Exchange is a means of communication in interstate commerce. We have found no federal court opinion precisely on point and have been cited to none. However, the S. E. C. has considered the question and has consistently held that a national stock exchange is a means of communication in interstate commerce within the Securities Act of 1933. The reasoning supporting this position was well-stated in *Brooklyn Manhattan Transit Corp.*, 1 S. E. C. 147, 173 (1935).

> "It would appear that a stock exchange . . . which has become registered as a national securities exchange under the Securities Exchange Act of 1934 may, because of the intimate and unbroken relationship of transactions on such exchange to the interstate 'flow' of securities through such an exchange [citing cases], in itself be regarded as a means of or instrument of communication or transportation in interstate commerce ... ."

See *Cady, Roberts & Co.*, S. E. C. Securities Exchange Act Release No. 6668, CCH Fed. Sec. L. Rep. ¶76,803 (1961);

Consolidated Development Corp., S. E. C. Securities Act Release No. 4287, CCH Fed. Sec. L. Rep. ¶76,723 (1960); 3 Loss, *Securities Regulations*, 1520-21 n. 4 (2d ed. 1961).

We think that the construction adopted by the S. E. C. is in harmony with the plain meaning of the statute. See *S. E. C.* v. *Associated Gas & Electric Co.*, 99 F. 2d 795, 798 (2d Cir. 1938). Indeed, even without such guidance, we would be quite reluctant to hold that transactions on the floors of the various national exchanges, the market places and nerve centers of national financial activity, were not encompassed within the broad language of the 1933 Securities Act. In *Schiller* v. *H. Vaughan Clarke & Co.*, 134 F. 2d 875, 878 (2d Cir. 1943), this court commented: "In declaring unlawful the transactions described in section 5 Congress meant to exert its power to the full constitutional extent permitted by the commerce clause and the postal clause."

THE "CONTROL" CONCEPT UNDER THE SECURITIES ACT

Appellant Batkin advances the theory that the concept of "control" stock is unconstitutionally vague and indefinite since "control" is nowhere defined in the statute and that the trial court's instructions on this point were defective. Neither contention is well taken. The meaning of "control" under the act is no different than it is in normal everyday usage. "The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding." *Sproles* v. *Binford*, 286 U. S. 374, 393 (1932); *cf. United States* v. *Guterma*, 281 F. 2d 742, 746-47 (2d

Cir.), *cert. denied*, 364 U. S. 871 (1960); *United States* v. *Minuse, supra*. The instructions to the jury in this connection were sufficient. In any event, appellants failed to object to the portions of the charge now thought to be inadequate. Fed. R. Crim. P. 30.

ADMISSION OF CO-DEFENDANTS' S. E. C. TESTIMONY

In the course of the trial the Government read to the jury 340 pages of testimony previously given before the S. E. C. by Re, Sr., Re, Jr. and Grande. The purpose of this recital was to establish guilty knowledge on the part of those defendants. The S. E. C. testimony contained no references to Batkin. Before each defendant's testimony was read, the prosecutor stated that it was offered solely against the defendant who gave it, and the trial court, both before and after each of the three readings, specifically and thoroughly instructed the jury to the same effect. Again, in its charge, the court reiterated that such testimony could be considered "only with respect to the defendant allegedly involved in each instance and with respect to whom the testimony was received."

Batkin's unsupported claim that he was denied a fair trial because of the admission of the S. E. C. testimony is without merit. The testimony made no mention of his involvement in the conspiracy or in the substantive count. See *Delli Paoli* v. *United States*, 352 U. S. 232, 237 (1957). Moreover, the trial court made "clear and repeated admonitions to the jury at [the] appropriate times . . . [T]o say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disre-

garded clear instructions of the court in arriving at their verdict." *Opper* v. *United States*, 348 U. S. 84, 95 (1954); see *United States* v. *Dardi, supra*, 330 F. 2d at 334; *United States* v. *Aviles*, 274 F. 2d 179, 192-93 (2d Cir.), *cert. denied*, 362 U. S. 974 (1960); *United States* v. *Kaye*, 251 F. 2d 87, 90 (2d Cir.), *cert. denied*, 356 U. S. 919 (1958).

Batkin also contends that because four perjury counts based on this same testimony had been severed prior to trial it was error for the trial court to allow the transcript to be read into the record.[7] However, the ruling on the motions for severance of the perjury counts was necessarily made solely on the information contained in the indictment. The trial judge, on the other hand, had the benefit of the opening arguments and several weeks of trial. He had also examined the S. E. C. material before allowing it to be read into evidence. Under these circumstances, the trial judge was not prohibited from ruling as he did.

SUFFICIENCY OF THE EVIDENCE ON COUNTS TWO AND THREE

1. *Appellant Batkin*

The only proof in the record going directly to the allegations of count three, which charged a sale of 200 shares of Swan-Finch by Batkin and defendant Yaffe, was a stipulation of counsel. It was agreed that one Ernest Lehne of Browntón, Minnesota if called to testify would say that he purchased 200 shares of Swan-Finch from Sinclair Securities and thereafter received its confirmation of the sale through the mail. The trial court properly instructed the

[7] This testimony was the basis for counts four through eight of the indictment. See footnote 1, *supra*.

jury that it would find Batkin guilty on this count if he "acquired the stock [*i.e.*, the 200 shares sold to Lehne] from Birrell with a view to offering it to the public or participated with Birrell in the sale of the stock to the public." Batkin reasons that his conviction on this count must be reversed because there was no evidence that Birrell, the "control" person, was the source of the 200 shares. The Government concedes that it presented no proof that these 200 shares emanated from Birrell, suggesting that it had no obligation to do so because the jury could find from all the evidence that this sale was in furtherance of the conspiracy alleged in count one.

It is settled that the Government need not prove that an "underwriter" acquired the "control" shares directly from the "issuer" or control person. *S. E. C.* v. *Culpepper*, 270 F. 2d 241, 246-47 (2d Cir. 1959); see *S. E. C.* v. *Chinese Consol. Benev. Ass'n*, 120 F. 2d 738 (2d Cir.), *cert. denied*, 314 U. S. 618 (1941); *Reiter-Foster Oil Corp.*, 6 S. E. C. 1028, 1035-36 (1940). Nonetheless, there must be sufficient proof that the shares actually sold were in fact "control" shares.

While Batkin's complicity in the conspiracy may have been proven by abundant evidence, it was still necessary for the Government to establish that the transaction depicted in count three was in itself unlawful. See *United States* v. *Agueci*, 310 F. 2d 817, 828 (2d Cir. 1962), *cert. denied*, 372 U. S. 959 (1963). Since there was no evidence from which the jury could find that the 200 shares of Swan-Finch sold by Sinclair Securities came from Birrell, Batkin's conviction on count three must be reversed.

2. *Appellants Re, Jr. and Grande*

Re, Jr. and Grande also question the sufficiency of the evidence but the thrust of their argument is much different than Batkin's. They concede that Re, Sr. caused 8,900 unregistered shares of Swan-Finch to be sold on the floor of the Exchange as charged in count two and that those shares constituted "control" shares. They also admit that "there was evidence which tended to show that Gerard Re (and Grande) may have done things to facilitate the transmission of the stock through Haupt's office to the buyers. . . ." The error, they argue, is that their participation was connected not with the sale, 15 U. S. C. A. §77e(a)(1), but with the *delivery*, a different and distinct offense covered by 15 U. S. C. A. §77e(a)(2). Whatever the merits of this contention, it ignores the fact that count two also charged a violation of the aider and abettor statute, 18 U. S. C. A. §2. Thus, the court instructed the jury: "[I]f you find that the particular defendant did not himself violate the Securities Act, but if you find that he aided, abetted, counseled or induced another to violate it, he is just as guilty as if he had violated the Act himself." By facilitating the transmission of the stock so as to complete the transaction, Re, Jr. and Grande associated themselves with the sale and thus could have been found to have aided and abetted Re, Sr. See *United States* v. *Campisi*, 248 F. 2d 102, 104 (2d Cir.), *cert. denied*, 355 U. S. 892 (1957); cf. *S. E. C.* v. *Culpepper*, *supra*, 270 F. 2d at 247.

THE ALLEGED MISCONDUCT OF THE RES' FORMER LAWYER

The Res seek a reversal on all counts because an attorney, a "Mr. Z,"[8] who at one time had represented them, also represented one Nahum Birnbaum, a Government witness at trial. After a thorough hearing, which included the testimony of Mr. Z, the trial court concluded that appellants' rights had not been prejudiced and that appellants had not been denied a fair trial.

Birnbaum's firm, Birnbaum & Co., was a longtime client of the law firm in which Mr. Z was a partner. In 1957, Birnbaum & Co. was a respondent, as was the Re firm, in an action in which the S. E. C. sought to enjoin the sale of Swan-Finch stock. Mr. Z appeared for Birnbaum & Co. and the Re firm was represented by another lawyer. In 1961, the Res retained Mr. Z when the S. E. C. acted to revoke their registration as broker-dealers due to their dealings in Swan-Finch stock. At that time, Mr. Z explained to the Res that his firm represented Birnbaum and that he could not take any employment that would be inconsistent with Birnbaum's representation; however, Mr. Z saw no conflict and agreed to act on behalf of the Res in the revocation proceeding. Shortly after that matter was completed, the Res were arrested on a complaint which charged market violations concerning the stock of Thompson-Starrett Company, Inc. At their request, Mr. Z appeared as attorney of record before the United States Commissioner to fix bail, and after the arraignment represented the Res at one or two conferences at the United States Attorney's Office. However, Mr.

[8] To avoid embarrassment, we join the parties in not referring to the lawyer or his firm by the correct name.

Z was soon replaced and had no further association with the Res.

Birnbaum was subsequently called to testify before the Grand Jury, but Mr. Z was involved only to the extent of arranging for the time and place of Birnbaum's appearance. Mr. Z was not present during Birnbaum's interviews at the United States Attorney's Office, and did not confer with Birnbaum about his testimony before or after it was given. After the return of the Res' indictment, Mr. Z did not discuss the case with Birnbaum, and the only connection Mr. Z or his firm had with Birnbaum's testimony at trial was supplying a photostatic copy of one of Birnbaum's records. Mr. Z testified that he never discussed with Birnbaum or any Government official any aspect of his representation of the Res. Thus, Mr. Z and his firm represented Birnbaum in connection with the Re prosecution only to the point of arranging a time and place for his Grand Jury appearance. Birnbaum continued, however, as a client of the firm.

The Government agrees that it had notice of Mr. Z's appearance for the Res and of his representation of Birnbaum. For purposes of this appeal, it assumes that the Res gave confidential material to Mr. Z.

Lacking even the most remote evidence that confidences of the Res were in fact violated, appellants invoke the proposition that where identity of subject matter of a litigation is shown, an irrebutable inference arises that a lawyer who has represented both parties will have obtained and used confidences of the former client to the detriment of that client in the pending litigation. However, assuming,

without deciding, both the correctness of this theory and its automatic applicability in a criminal case to warrant a reversal of a conviction, we do not see that it can serve appellants under these facts. In *T. C. Theatre Corp.* v. *Warner Bros.*, 113 F. Supp. 265 (S. D. N. Y. 1953), from which appellants seem to derive their theory, defendant corporation moved to disqualify a lawyer for the plaintiff who had earlier represented defendant on an appeal from an adverse judgment in an anti-trust case. The litigation then pending alleged substantially the same conspiracy found to exist in the earlier case. Thus, there was a *prima facie* violation of Canon 6 of the Canons of Professional Ethics. However, the now lawyer for the plaintiff claimed that no confidence had, in fact, been divulged. In granting defendant's motion, the court held that the former client had only to show that the "matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters . . . wherein the attorney previously represented him, the former client." 113 F. Supp. at 268. Whatever bearing that decision might have if Mr. Z had joined in the prosecution or if Birnbaum had joined forces with the Government, that is not this case. Birnbaum was not a party litigant. And, his testimony appears to have been not at all crucial. The District Court thus commented that "Birnbaum was not a prosecuting witness here. He testified with one exception as to records that were in his firm's possession." Moreover, Mr. Z's representation of Birnbaum did not extend to his appearance in the Grand Jury proceedings, when the possibility of conflicting interests first might have been detected.

or to his appearance at trial. Mr. Z, either by design or accident, was never in a position where in his representation of Birnbaum he might have made improper, if unconscious, use of confidences of his former clients. As far as the Re proceedings were concerned, Mr. Z as a practical matter had withdrawn before the possibility of conflict developed. See Canon 37, Canons of Professional Ethics.

We conclude that the conduct of Mr. Z was not improper and that appellants have failed to show that his professional relationship with Birnbaum prejudiced their defense in any manner. Their claim on this point falls well short of the mark that would justify reversing the convictions.

The judgments of conviction on counts one and two are affirmed; the conviction of appellant Batkin on count three is reversed with instructions to dismiss count three of the indictment as to him.

APPENDIX B

Judgment of United States Court of Appeals

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fourth day of July, one thousand nine hundred and sixty-four.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HOWARD J. FRIENDLY,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GERARDO A. RE, also known as JERRY A. RE, GERARD F. RE, CHARLES A. CASAGRANDE, also known as CHARLES A. GRANDE, also known as CHARLES A. GRANDE, ELY BATKIN, LOWELL M. BIRRELL, et al.,

Defendants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgments of said District Court as to counts one and two be and they hereby are affirmed.

It is further oredered adjudged and decreed that the Judgment of Conviction of appellant Batkin as to count three be and it is hereby reversed with instruction to dismiss count three of the Indictment as to him in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX C

Constitutional Provisions and Statutes Involved

UNITED STATES CONSTITUTION

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

TITLE 15, U.S.C.

77b. Definitions.

When used in this subchapter, unless the context otherwise requires—

* * * * *

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

* * * * *

§ 77c. Exempted securities.

(a) Except as hereinafter expressly provided, the provisions of this subchapter shall not apply to any of the following classes of securities:

(1) Any securities which, prior to or within sixty days after May 27, 1933, has been sold or disposed of by the issuer or bona fide offered to the public, but this exemption shall not apply to any new offering of any such security by an issuer or underwriter subsequent to such sixty days;

* * * * *

§ 77d. Exempted transactions.

The provisions of Section 77e of this title shall not apply to any of the following transactions:

(1). Transactions by any person other than an issuer, underwriter, or dealer; transactions by an

issuer not involving any public offering; or transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except transactions taking place prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter and transactions in a security as to which a registration statement has been filed taking place prior to the expiration of forty days after the effective date of such registration statement or prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter after such effective date, whichever is later (excluding in the computation of such forty days any time during which a stop order issued under section 77h of this title is in effect as to the security), and except transactions as to securities constituting the whole or part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.

* * * * *

§ 77e. Prohibitions relating to interstate commerce and the mails.

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this subchapter, unless such prospectus meets the requirements of section 77j of this title; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 77j of this title.

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title.